UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, **Plaintiff,** **- against -** **UNITED STATES DEPARTMENT OF DEFENSE,** **Defendant.**	:	**ECF Case** **No. 05 Civ. 5468 (JSR)**

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO PRE-ARB TRANSFER/RELEASE DOCUMENTS

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PRELIMINARY STATEMENT

This motion for partial summary judgment by the Department of Defense ("DOD") renews and expands DOD's effort to block disclosure of the timing and circumstances surrounding its release and transfer of detainees from captivity at Guantanamo Bay, Cuba ("Guantanamo"). Under Order of this Court, DOD this year identified for the first time the 739 individuals it has incarcerated at Guantanamo since September 11, 2001. Although fewer than 450 detainees remain at Guantanamo today, DOD has largely refused to acknowledge who has been released, when or why. Without such information it is impossible for the public to assess the extraordinary actions taken by DOD in detaining individuals, without charge, for years on end, only to release them without explanation.

Through the instant motion DOD seeks to withhold virtually all substantive information contained in the very documents through which it effected the removal of several hundred detainees from Guantanamo *before* a system of Administrative Review Boards ("ARBs") was created in late 2004 to oversee such decisions. The so-called "pre-ARB" release decisions now at issue fall into two conceptually distinct categories: (1) detainees who were released because, upon review, DOD determined they were not actually "enemy combatants" in the first place, and (2) detainees who DOD does believe to be enemy combatants, but were nonetheless voluntarily released or transferred to other countries. While DOD apparently is willing to identify by name the 67 detainees it decided were not enemy combatants, it is unwilling to identify *anything* relating to the release or transfer of other detainees – withholding even their names from the documents authorizing their transfer or release.

DOD took a similar position in previously providing to AP in this litigation the decisional documents relating to 23 individuals who were transferred or released from Guantanamo following a review of their status by an ARB. DOD heavily redacted these earlier transfer/release records to conceal both the identity of the detainee and the facts surrounding his release, claiming that the identities of the detainees is protected under Exemptions 5 (agency deliberations) and 6 (personal privacy) of the Freedom of Information Act ("FOIA").[1] Its arguments have no greater merit now than before. DOD thus strains to assert broad applications of other FOIA exemptions, arguing that information in the pre-ARB documents can also be withheld under Exemption 1 (national security) and Exemption 2 (internal agency rules). DOD, again, reads the statutory exemptions too expansively in its zeal to withhold newsworthy information of keen public interest that ought to be disclosed under the law.

AP has no quarrel with some of the exemptions applied by DOD to the decisional documents. AP has no interest in jeopardizing intelligence gathering operations, exposing confidential law enforcement techniques, or invading the legitimately confidential attorney-client communications among government employees. But, FOIA exemptions should not be applied indiscriminately so as to defeat the public's right to know what the government has done with the Guantanamo detainees and why.

At issue in this motion, it bears emphasizing, are the facts and circumstances presented in documents that formed the basis for a final decision to release or transfer a detainee. Pre-ARB transfer/release documents, like those presented to the Court in DOD's sample, are believed to exist for some 200 or more people who were captured around the world, removed to Guantanamo, held *incommunicado*, and then released by DOD without ever being charged with any crime. The public has a significant and legitimate interest in knowing who was removed

[1] DOD's withholding of information concerning these 23 detainees is subject of an earlier DOD motion for summary judgment in this action that is fully briefed and *sub judice*.

from Guantanamo, when they were transferred or released, and the government's reasons for acting as it did.

As set forth below, DOD has not met its burden of demonstrating a proper basis for its large scale refusal to disclose information about the Guantanamo detainees. DOD's wholesale redactions of the sample documents, moreover, make it impossible to determine meaningfully the extent to which the exemptions it invokes actually apply. The Court should therefore review the sample documents, in unredacted form, *in camera* before attempting to determine whether DOD has met its significant burden to keep this information secret. AP urges the Court to review DOD's claims of privilege carefully, and to apply the FOIA exemptions narrowly, so as to permit the public to understand – to the greatest extent possible under the law – what actions were taken by DOD and why.

STATEMENT OF FACTS

A. Background

The relevant background facts are set forth in AP's Memorandum dated March 3, 2006 opposing DOD's original motion for summary judgment concerning the ARB transfer/release documents,[2] and are summarized here only in brief.

Since January 2002, DOD has detained at least 759 individuals at Guantanamo. *See* Declaration of David A. Schulz ("Schulz Decl.") ¶ 7, Ex. C. Although, the government consistently asserts that these detainees are dangerous terrorists,[3] 315 of them have been released

[2] *See* Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment, filed March 3, 2006 in *AP v. DOD*, No. 05 Civ. 5468 ("*AP II*") (referred to hereafter as the "AP March 3 Memo").

[3] *See, e.g.*, John Mintz, *Debate Continues on Legal Status of Detainees*, Wash. Post, Jan. 28, 2002, at A15 (quoting Vice President Cheney saying that detainees "are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans."); Katherine Q. Seelye, *Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. Times, Jan. 28,

or transferred out. *Id.*, Ex. B. More than 200 apparently were removed from Guantanamo before the ARB process of annual reviews was initiated in December 2004. It is the decisional documents relating to the transfer or release of these "pre-ARB" detainees that are the subject of this "test" motion.

1. Pre-ARB detainee review process.

After beginning to confine "enemy combatants" at Guantanamo in late 2001, DOD asserted that they could be held there indefinitely until the end of the war on terrorism, with virtually no legal rights under U.S. law or international treaties. Detainees at Guantanamo and elsewhere challenged the process by which they were designated enemy combatants and the legality of their imprisonment by the United States. While *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) were pending before the Supreme Court, DOD created the ARB process to review each detainee annually and assess whether he remains a threat to the United States, and recommend whether he should be released, transferred to the custody of another country, or further detained. *See* May 11, 2004 Order of Deputy Secretary of Defense Paul Wolfowitz (Ex. 1 to February 22, 2006 Declaration of Karen L. Hecker ("First Hecker Decl.")). The first ARB was convened on December 14, 2004. *See* Schulz Decl. Ex. D. In the first year, 464 ARBs were held; as a result of these proceedings 14 detainees were released outright and transfers recommended for another 119. *See id.*

Several hundred detainees were removed from Guantanamo *before* the ARB process was established. In seeking summary judgment, DOD has described the administrative procedures it followed before the ARBs to determine whether to release a detainee from Guantanamo. *See* Declaration of Charles D. Stimson ("Stimson Decl."), ¶ 4. This prior process was managed at

2002, at A6 (quoting Secretary of Defense Rumsfeld saying that detainees "are among the most dangerous, best trained, vicious killers on the face of the earth").

first by DOD's Office of Special Operations/Low Intensity Conflict (SO/LIC) and later by the Office of Detainee Affairs ("DA"). *Id.* This office would consult with other components of DOD and law enforcement, and then present a recommendation to Deputy Defense Secretary Paul Wolfowitz for action. *Id.* ¶ 7. Secretary Wolfowitz had final authority to authorize the transfer or release of any detainee. *Id.* ¶ 6.

As part of its review process, DA requested the Joint Task Force-Guantanamo Bay ("JTF-GTMO"), through the U.S. Southern Command ("USSOUTHCOM"), for its assessment of any detainee being considered for transfer or release. *See* Declaration of Rear Admiral Harry B. Harris, Jr. ("Harris Decl.") ¶ 5. That assessment, according to DOD's motion, normally included background information about the detainee, JTF-GTMO's assessment of the detainee's "intelligence value" and "threat level," and JTF-GTMO's release or transfer recommendation. *Id.* ¶ 6; *see also id.* Ex. 1 ("sample JTF/USSOUTHCOM memo"). The background information is said to have typically contained biographical information about the detainee, as well as information about his alleged affiliation with enemies of the United States, his activities, and his capture and transfer to Guantanamo. *See id.* ¶ 14.

DA also obtained an assessment from DOD's Criminal Investigation Task Force ("CITF") before deciding to recommend a transfer or release. *See* Declaration of Colonel David A. Smith ("Smith Decl.") ¶ 6. The CITF assessment is described as also containing background information about the detainee, together with CITF's assessment of the detainee's law enforcement value and threat level, the status of CITF's law enforcement investigation of the detainee, and CITF's recommendation about whether to release, transfer, or continue to detain the individual. *See id.* ¶¶ 7, 9; *see also id.* Ex. 1 ("sample CITF memo").

Beyond obtaining input from JTF-GTMO and from CITF, in certain cases DA may have consulted with other DOD components and government agencies. *See* Stimson Decl. ¶ 5. DA would then use the information it collected to prepare an "Action Memorandum" for review by the Deputy Secretary of Defense, setting forth DA's transfer or release recommendation. *See id.* ¶ 6; *see also id.* Ex. 1 ("sample Action Memo"). As described by Col. Smith, this document contained DA's recommendation to the Deputy Defense Secretary to release, transfer, or continue to imprison a detainee (several detainees could be discussed in one Action Memo), and a summary of the recommendations provided to DA by JTF-GTMO, CITF, and any other government components that may have been contacted. *See id.* ¶ 6. According to DOD, these Action Memoranda contained factual information about the detainee, and background details relevant to the assessment his law enforcement or intelligence value, *see id*, as well as attaching a one-page "worksheet" summarizing similar information. *See id.* ¶¶ 7, 8; *see also id.* Ex. 2 ("sample DA worksheet").[4]

Based on these documents, the Deputy Defense Secretary made the final decision whether to release or transfer each detainee discussed in the Action Memorandum. *See id.* ¶ 6; *see also* August 22, 2006 Declaration of Karen L. Hecker ("Second Supp. Hecker Decl."), ¶ 4. The sample Action Memo submitted by DOD on this motion apparently addresses 25 detainees considered for release or transfer in July 2004. *See* Stimson Decl. Ex. 1. The Action Memorandum recommended that 6 of the detainees be released and 19 be transferred to the control of their home government. A stamp on the first page states: "DEP DEF SEC HAS SEEN JUL 14, 2004." Stimson Decl. Ex. 1. The last page of the sample Action Memo sets forth the

[4] The worksheet included basic biographical information about the detainee, such as name, ISN, date of birth, and place of birth, photograph, additional background factual information from the JTF-GTMO assessment, JTF-GTMO's and CITF's assessments of the detainee's intelligence and law enforcement value, and threat risk. *See* Stimson Decl. ¶ 5.

specific transfer and release recommendations, and contains Secretary Wolfowitz's handwritten initials and date to indicate his approval. *See id.* The sample Action Memo also contains a "handwritten direction" from the Deputy Secretary about interactions with the home government of the detainees, which has been redacted. Stimson Decl. ¶ 8c.

2. Review of a detainee's enemy combatant status.

Through other pre-ARB procedures DOD released 67 individuals after concluding they were not actually enemy combatants at all. In response to the Supreme Court's rulings in *Hamdi* and *Rasul* – that U.S. courts have jurisdiction to hear certain challenges by detainees – DOD in 2004 created Combatant Status Review Tribunals (CSRTs) to serve as an impartial forum to determine whether a detainee was properly considered an "enemy combatant." *See* Schulz Decl. Ex. E. In making each of these determinations, DOD created a classified and unclassified summary of the basis for the CSRT's decision. *See* Second Supp. Hecker Decl. ¶ 16. From July 2004 through January 2005, DOD convened a total of 558 CSRTs, which determined that 38 of the detainees did not meet the definition of "enemy combatant." *See id.* Ex. F. All but three of these detainees have since been released from Guantanamo. *See id.* ¶ 16b.

Before DOD created the CSRTs, it apparently had another process for reviewing someone's enemy combatant status. The details of this procedure are not clear, but DOD's declarations assert that DOD determined in March 2004 that 29 detainees "no longer met the definition of 'enemy combatant.'" Harris Decl. ¶ 29. In making this determination, JTF-GTMO prepared a memorandum with background information about the detainee, presenting its own "analytical conclusions" about that information, and recommending expedited transfer or release. *See id.* ¶¶ 29-30; *see also id.* Ex. 4 ("sample enemy combatant status memo"). All 29 of these detainees have left Guantanamo. *See* Second Supp. Hecker Decl. ¶ 15.

3. Related pending motions.

As the Court is aware, DOD initially refused to provide AP with identifying information about any of the Guantanamo detainees. In response to the Court's prior orders in *Associated Press v. Dep't of Defense*, 05 Civ. 3941 ("*AP I*"), DOD released for the first time a list of all 759 detainees, providing their name, Internment Security Number ("ISN"), citizenship, place of birth, and date of birth. *See* Schulz Decl. Ex. C. In this subsequent lawsuit, DOD continues to object to producing information about detainee abuse, information about detainees who have been transferred or released from Guantanamo, and certain detainee correspondence requested by AP. The parties previously briefed and argued several issues in *AP II*, including, *inter alia*, whether DOD may withhold detainee identifying information contained in the "post-ARB" transfer/release documents for detainees removed from Guantanamo following the recommendation of an Administrative Review Board. *See* AP March 3 Memo at 2-8. Finally, in a third related lawsuit, DOD disputes AP's requests for an identifying photograph of each detainee, information maintained by DOD concerning detainees' weights and heights, and other detainee identifying information. *Associated Press v. Dep't of Defense*, 06 Civ. 1939 ("*AP III*"). DOD's motion for summary judgment is *sub judice* in that case as well.

B. The Specific FOIA Request At Issue and DOD's Response

On January 18, 2005, AP submitted a FOIA request seeking, among other things: "Details and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made." *See* Schulz Decl. Ex. A.

DOD failed to produce anything in response to this request until AP initiated this lawsuit in June 2005. Subsequently, DOD provided AP with heavily redacted copies of documents for 23 detainees whom DOD had decided, through the ARB process, to release or transfer ("ARB documents"). When this limited production of ARB documents was challenged by AP as not fully responding to the FOIA request, DOD ultimately agreed at oral argument that it would search for the transfer/release documents for all detainees removed from Guantanamo, including those that resulted from any pre-ARB review process. *See* AP March 3 Memo at 8-10; Second Supp. Hecker Decl. ¶ 2.

Given DOD's estimate that it would take more than a year to review and redact these pre-ARB records, DOD proposed in the first instance to produce a sample of the types of pre-ARB transfer/release documents encompassed in AP's request, in order to reveal the scope of information that DOD contended was protected against disclosure under FOIA. *See id.* DOD has now produced samples of: (1) an Action Memo; (2) a sample DA worksheet; (3) a JTF/USSOUTHCOM memo; (4) a CITF memo; and (5) an enemy combatant status memo (collectively, the "transfer/release documents"). *See* Second Supp. Hecker Decl. Exs. 1-5. The sample documents are heavily redacted, with virtually *all* substantive information removed. DOD is unwilling even to release the names of the detainees who were removed from Guantanamo as a result of the decisions embodied in the sample documents, beyond its limited agreement to provide the names of the 67 detainees who were released because they were found not to be enemy combatants. Second Supp. Hecker Decl., ¶ 15, Ex. 5.[5]

C. Redactions Disputed By AP

DOD invokes four FOI exemptions as authorizing it to withhold virtually all substantive information contained in the sample documents: Exemption 1 (national security), Exemption 2 (internal agency procedures), Exemption 5 (deliberative agency process), and Exemption 6 (unwarranted invasion of personal privacy in medical, personnel and related records). For

[5] For the 38 detainees determined not to be enemy combatants as a result of the CSRT process, DOD has agreed also to release the "'unclassified Summary of the Basis for Tribunal Decision,'" withholding only the names of DOD personnel, Second Supp. Hecker Decl. ¶ 16, but none of those documents have yet been provided.

purposes of this motion, AP does not now object to all of DOD's redactions in their entirety.[6]

It's objections to DOD's wholesale secrecy fall into three general categories:

1) AP objects to DOD's refusal to provide the detainee identifying information contained in the Action Memo, the DA worksheet, and the JTF/USSOUTHCOM and CITF memos collected by DA.[7] DOD claims that this information is protected under FOIA's Exemption 6, Second Supp. Hecker Decl. ¶¶ 10-12, and, for those detainees who have not yet left Guantanamo, also by Exemption 5. *See Id.* ¶¶ 10-13. These issues have previously been briefed in this case in connection with the post-ARB transfer/release documents. *See* AP March 3 Memo at 17-26.

2) AP objects to DOD's refusal to provide the factual details collected and analyzed in the decisional documents. DOD contends that background information about the detainees is classified and may therefore be withheld under Exemption 1, and that some of this information may also be withheld under Exemption 2, on the ground that its release would disclose internal agency procedures and allow them to be circumvented.

3) AP objects to DOD's refusal to provide the reasons upon which it justified the transfer or release of a detainee. In addition to Exemptions 1 and 2, DOD contends that all such information may be withheld under the "deliberative process privilege," codified in Exemption 5.

AP seeks the release of detainee identifying information, the relevant facts presented in the decisional documents, and the reasons articulated in the Action Memo for the transfer or release decision, because this information is newsworthy and important to the public's understanding of DOD's handling of the Guantanamo detainees. DOD has not established a proper basis for its wholesale refusal to release this information in its entirety, as will now be demonstrated.

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[6] AP does not now challenge DOD's redaction of the full ISN numbers, names of DOD employees, confidential attorney-client communications, the identification of specific databases seared by CITF, nor the handwritten note of the Deputy Defense Secretary. *See* Schulz Decl. ¶ 4. AP reserves its right to later challenge DOD's refusal to produce this information in other contexts.

[7] As noted, DOD does not seek to withhold detainee identifying information contained in the transfer/release records of individuals determined not to be enemy combatants. Second Supp. Hecker Decl. ¶¶ 15-16.

ARGUMENT

I.

DOD'S HEAVY BURDEN TO WITHHOLD INFORMATION

This motion arises out of a reporter's straightforward request for the "[d]etails and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made." *See* Schulz Decl., Ex. A. In response, DOD broadly invokes a number of FOIA exemptions to avoid virtually any disclosure at all concerning the removal of detainees from Guantanamo – refusing even to identify names of detainees in the documents authorizing their own release. DOD's expansive reading of the FOIA exemptions, if permitted to stand, would defeat the very purpose of FOIA, which unambiguously exists "to promote honest and open government and . . . to hold the governors accountable to the governed." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005) ("*La Raza*") (internal quotation and citation omitted). *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (FOIA exists "to ensure an informed citizenry, vital to the functioning of a democratic society").

In seeking to achieve wholesale secrecy for virtually all facts surrounding its release of detainees, DOD alone bears the heavy burden of demonstrating that the information requested by AP falls within one of the specific, enumerated exemptions in the Act. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979). And, "[c]onsistent with FOIA's purposes, these statutory exemptions are narrowly construed." *La Raza*, 411 F.3d at 355-56. District courts are to review *de novo* all claims of exemption advanced by an agency and, if necessary, examine records *in camera* to determine if the statutory exemptions have properly been invoked. *See, e.g.*, *King v. U.S. DOJ*, 830 F.2d 210 (D.C. Cir. 1987); *see generally* AP March 3 Memo at 8-10.

Summary judgment is not appropriate unless DOD proves that there are no material facts in dispute and it is entitled to judgment as a matter of law. *Halpern v. FBI*, 181 F.3d 279, 287-88 (2d Cir. 1999). To meet this standard, DOD must prove that the specific redactions it has made to records sought by AP are expressly authorized by a FOIA exemption. *Carney v. U.S. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). AP respectfully submits that DOD has not met this burden on the record before this Court.

II.
EXEMPTION 5 DOES NOT BROADLY EXEMPT DISCLOSURE OF DOCUMENTS REFLECTING DOD'S DECISION TO TRANSFER OR RELEASE A DETAINEE

As a threshold matter, the transfer/release documents are not broadly exempt from disclosure under Exemption 5 in the manner urged by DOD. Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . [or] litigation with the agency." 5 U.S.C. § 552 (b)(5). This exemption is intended to protect the internal deliberations of an agency in order "to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." *Tigue v. U.S. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citations and internal quotations omitted). For this privilege to apply, the information being withheld must be both "predecisional" and "deliberative." *La Raza*, 411 F.3d at 356.

AP has previously demonstrated that records documenting a decision to release or transfer a detainee are not "predecisional." *See* AP March 3 Memo at 21-23 (citing cases). DOD's instant motion thus appears to abandon the broad proposition, advanced earlier, that even a final determination by DOD to release a detainee is somehow "predecisional" under Exemption 5 until the decision is actually implemented. *See* Second Supp. Hecker Decl. ¶ 16 (agreeing to produce unclassified CSRT decisions finding that detainees are not "enemy combatants" even for detainees who remain at Guantanamo). But, DOD still applies an overly broad reading of the deliberative process exemption.

First, the Action Memorandum itself should not be considered predecisional because it is the final authority, issued by the Deputy Secretary of Defense, to transfer or release a prisoner. The deliberative process privilege generally does not apply to the reasoning actually followed by an agency in taking a final action – when an agency adopts its own predecisional and deliberative information in a final action, Exemption 5 no longer applies. *Cf.*, *La Raza*, 411 F.3d at 356-57; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). To decide whether an agency has adopted a predecisional position, a court "must examine *all* the relevant facts and circumstances." *La Raza*, 411 F.3d at 357 n.5 (emphasis in original). While the Court of Appeals has recognized that making a "yes or no" determination based on a recommendation does not necessarily demonstrate that the reasoning provided in support of it was adopted, *id.* at 359, a court needs to look to all the "evidence that the recommendation was actually adopted or incorporated." *Id.*

Here, the record establishes that the Action Memo was presented to the Deputy Secretary, reviewed and approved as recommended. There is nothing to suggest the Deputy Secretary disagreed with the course of action laid out in the sample Action Memo, or at any other time approving any Action Memo. Nor is there any evidence that the final decision was ever based upon facts outside of an Action Memo. This document contains DOD's findings of fact and conclusions of law, and once signed authorizes the transfer or release of a specific date. It is not "pre-decisional" in any meaningful sense. *See* Stimson Decl. ¶¶ 8-10; Harris Decl. ¶ 27-28; and Smith Decl. ¶ 16-17.

Second, the deliberative process privilege applies only to opinions and recommendations, not the facts on which such evaluations are based. Facts presented in the Action Memorandum, and all the other supporting documents, thus may not be withheld under Exemption 5, even if those documents are both "pre-decisional" and "deliberative." The deliberative process exemption does not extend to "purely factual material . . . in a form that is severable." *E.g.*, *EPA v. Mink*, 410 U.S. 73, 91 (1973); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). Exemption 5 thus does not authorize DOD to withhold the facts contained in the memorandum submitted by JTF/GTMO, USSOUTHCOM, CITF, and OGC. *See Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *Hopkins v. U.S. HUD*, 929 F.2d 81, 85 (2d Cir. 1991); *Reino De Espana v. Am. Bureau of Shipping*, 03CIV3573LTSRLE, 2005 WL 1813017, at *11 (S.D.N.Y. Aug. 1, 2005).

III.
EXEMPTION 6 DOES NOT AUTHORIZE DOD TO WITHHOLD DETAINEE IDENTIFYING INFORMATION CONTAINED IN THE TRANSFER/RELEASE RECORDS

Repeating arguments made in its pending motion for summary judgment concerning the ARB documents, DOD again speculates that disclosing the identity of a detainee who has been transferred or released from Guantanamo could theoretically subject the detainee or his family to harm, because he has been labeled an "enemy combatant" by DOD, *id.* ¶ 12, and therefore withholds identifying information under Exemption 6. This exemption covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The presumption in favor of disclosure under Exemption 6 "is as strong as can be found anywhere in the Act." *Washington Post Co. v. U.S. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982). Even if a privacy interest is compromised, government information must be disclosed under

Exemption 6 when it "sheds light on an agency's performance of its statutory duties." *U.S. DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) ("Reporters Comm."). Without the identifying information contained in the transfer/release documents it is impossible to know how long a detainee was held at Guantanamo, whether detainees of certain countries or regions received different treatment, or answer a number of other questions about the propriety of DOD's handling of the detainees. DOD's speculation of potential harm cannot outweigh the public's right to understand what DOD has done with the detainees.

DOD does not even attempt to demonstrate any particular risk to the detainees addressed in the sample documents, instead seeking approval to redact categorically all identifying information. Categorical decisions to withhold information, however, are appropriate only where "a case fits into a genus in which the balance characteristically tips in one direction." *Id.* This Court rejected a categorical approach to detainee privacy in *AP I*, and DOD presents no reason for a different result here. Indeed, DOD's release of the names of those few detainees held not to be "enemy combatants" confirms that a categorical privacy claim is not warranted. *See* Harris Decl. ¶4; Second Supp. Hecker Decl. ¶ 15, Ex. 5.

The Court rejected arguments based on detainee privacy in ordering DOD to identify Guantanamo detainees in *AP I*, and this same reasoning should apply to disclosure of the identities of detainees who have been transferred or released. *See* AP March 3 Memo at 25-26, incorporated here by reference.

IV.
EXEMPTION 1 DOES NOT AUTHORIZE DOD TO WITHHOLD ALL BACKGROUND FACTS IN THE SAMPLE DOCUMENTS AS IT APPARENTLY HAS DONE

DOD broadly invokes Exemption 1 to withhold *inter alia,* all detainee background information that originated with JTF-GITMO, as well as various assessments of the detainees "intelligence value" and "threat" level. *See* Harris Decl. ¶¶ 14-15, 24-25; Smith Decl. ¶ 11. The background information includes such facts as a detainee's basic biographical information, his training and support of terrorist organizations, the circumstances of his capture by DOD and the reasons he was transferred to Guantanamo. Harris Decl. ¶ 14. DOD contends that this information is properly classified under criteria established by Executive Order 12958, and that release of this information "could reasonably be expected to cause serious damage to national security." DOD August 22 Memo at 8.

As with all FOIA exemptions, to prevail under Exemption 1 DOD bears the burden of demonstrating that the exemption applies: DOD must establish that it has properly classified the information procedurally, and that there is "'a logical connection'" between the release of the information and some likely damage to national security. *McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) (citation omitted); *see also Halpern*, 181 F.3d at 290 (withheld information must "logically fall[] within the classification categories" established in the relevant Executive Order); *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C. Cir. 1985); *Ajluni v. FBI*, No. 94-CV-325, 1996 WL 776996, at *5 (N.D.N.Y. July 16, 1996).

To meet this burden, DOD is required to establish the potential damage to national security with "reasonable specificity" through affidavits and other admissible evidence. *Halpern*, 181 F.3d at 291-92; *Rosenfeld v. U.S. DOJ*, 57 F.3d 803, 807 (9th Cir. 1995). This evidence is subject to *de novo* review by the Court, 5 U.S.C. § 552(a)(4)(B), and is not entitled to "blind deference," *Halpern*, 181 F.3d at 293; *see also Coldiron v. U.S. DOJ*, 310 F. Supp. 2d 44, 53 (D.D.C. 2004) ("No matter how much a court defers to an agency, its review is not vacuous.") (internal quotations and citations omitted). The question for the court is "whether on the whole record the [a]gency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility." *Gardels v. CIA,* 689 F.2d 1100, 1105 (D.C. Cir. 1982) (construing Exemption 3). *See also* AP May 22, 2006 Memo at 19-20.

DOD asserts that it may withhold detainee background information under Executive Order 12958, which allows classification of records that concern "intelligence sources or methods," E.O. 12958 § 1.5(c), where "the unauthorized disclosure of [the information] reasonably could be expected to result in damage to national security," *id.* § 1.3(3). *See* Memorandum of Law in Support of Defendant's Partial Motion for Summary Judgment ("DOD Mem.") at 6-8. In seeking summary judgment, DOD advances two specific risks from release of detainee background information: (1) that it could educate terrorists organizations about the quality and quantity of U.S. intelligence, and (2) that it could "reveal the source of the intelligence." Harris Decl. ¶¶ 16-18; *see* DOD Memo at 9-11.

Plainly, at least some of the background information DOD insists on withholding is beyond the protection of Exemption 1. For example, the exemption does not apply "where the government has officially disclosed the specific information the requester seeks." *Halpern*, 181 F.3d at 294; *see also, e.g., Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (ordering disclosure of documents already released to the public). DOD has officially released certain background information in making public the list of 759 detainees held at Guantanamo, and in releasing CSRT and ARB transcripts and related documents. Information that DOD has itself made public is not protected by Exemption 1 and should not be withheld from the transfer/release documents.

In addition, DOD's public submissions fail to establish a logical connection between disclosure of the redacted information and a likely harm to national security. DOD asserts that disclosing certain information could reveal "critical details about intelligence" it has obtained about terrorist organizations as well as "the sources of our intelligence," Harris Decl. ¶ 16, but does not establish how these concerns apply across the board to all background facts in the decisional documents, or even how they apply specifically to the redacted items in the sample documents. For example, factual biographical information about a detainee contained in a document authorizing a detainee's release, standing alone, would not likely reveal critical intelligence or sources, nor in many instances would the disclosure of the circumstances of a detainee's capture by DOD or a discussion of his conduct in captivity – indeed, these types of facts are disclosed in many of the ARB and CSRT transcripts previously released by DOD. *See Donovan v. FBI*, 806 F.2d 55, 60 (2d Cir. 1986) (affirming District Court's decision, after *in camera* review, that documents were not exempt because they posed "no danger of revealing the identity of the confidential source"), *limited on other grounds*, *U.S. DOJ v. Landano*, 508 U.S. 165 (1993).

At a minimum, DOD's claims under Exemption 1 are too broad to accept at face value and should therefore properly be tested through an *in camera* review of unredacted version of the sample documents.[8] *See infra*, Section VI.

V.
EXEMPTION 2 DOES NOT AUTHORIZE DOD TO WITHHOLD ITS ASSESSMENTS OF DETAINEES IN THEIR ENTIRETY

DOD contends that it may withhold under Exemption 2 many of the reasons that underlie its decision to release or transfer a detainee, including a summary of the detainee's intelligence value, law enforcement value, and threat or risk. *See* DOD Mem. at 13. The redactions from the

[8] DOD also withheld detainee photographs under Exemption 1. AP addressed the application of Exemption 1 to detainee photographs in *AP III*, and adopts its argument in that pending case by reference. AP May 22, 2006 Memo at 18-22.

sample documents suggest that these assessments are very brief. *See* Stimson Decl. Ex. 2. Indeed, sample ARB documents released by DOD suggest that detainees may be categorized simply in one word: as a "high, medium, or low" threat. *See* Schulz Decl. Ex. G.

Exemption 2 authorizes the government to withhold records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). This exemption applies to materials used for "'predominantly internal purposes,'" *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992), but only if they are sufficiently related to an internal rule or practice (citation omitted). *See, e.g.*, *Schwaner v. Dep't of Air Force*, 898 F.2d 793, 795-98 (D.C. Cir. 1990); *Abraham & Rose, P.L.C. v. United States.*, 138 F.3d 1075, 1079-82 (6th Cir. 1998). Typically, documents encompassed by Exemption 2 are agency rules or practices such as law enforcement manuals. *See, e.g.*, *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 545 (2d Cir. 1978); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1053 (D.C. Cir. 1981).

Only information that is "so closely related to [an agency's] rules and practices that disclosure could lead to disclosure of the rule or practice itself" may properly be withheld under Exemption 2. *Id.*; *see also id.* at 797 (the information must "shed significant light on a rule or practice; insignificant light is not enough"); *Abraham & Rose, P.L.C.*, 138 F.3d at 1080; *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1086 (9th Cir. 1997) (information may not be withheld if it "bears no meaningful relationship to" an internal rule or practice). Without this limitation, Exemption 2 could become "'all-encompassing,'" *Schwaner*, 898 F.2d at 797 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1150 (D.C. Cir. 1975) (Leventhal, J., concurring)), and would "flout the unmistakable intent of Congress that FOIA's exemptions are to be narrowly construed," *Maricopa Audubon Soc'y*, 108 F.3d at 1086.

As with all FOIA exemptions, the government has the burden under Exemption 2 to show that disclosure of specific information would, in fact, risk circumvention of an agency regulation. *See, e.g.*, *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980). Where there is no such demonstrated risk, Exemption 2 does not apply. *See, e.g.*, *Dep't of Air Force v. Rose*, 425 U.S. 352, 366, 369 (1976); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036-37 (N.D. Cal. 2005) (cited in DOD Mem. at 15-16); *News Group Boston, Inc. v. Nat'l RR Passenger Corp.*, 799 F. Supp. 1264, 1267-68 (D. Mass. 1992); *Oliva v. U.S. DOJ*, 84 Civ. 5741 (JFK),1985 WL 3825, at *3 (S.D.N.Y. Nov. 22, 1985); *Badhwar v. U.S. Dep't of Air Force*, 622 F. Supp. 1364, 1373 (D.D.C. 1985), *rev'd on other grounds*, 829 F.2d 182 (D.C. Cir. 1987).

DOD fails to demonstrate either that the information it is withholding under Exemption 2 bears any meaningful relationship to the protection of the type of internal personnel rules and practices protected by the exemption, or that disclosure of this information would actually risk disclosure or circumvention of those rules.[9] DOD acknowledges that it did not withhold any actual rules or practices, but rather contends that releasing its assessments of the detainees necessarily "would disclose the internal guidelines" JTF-GTMO and CITF used in preparing the assessments. DOD Mem. at 13. DOD offers only the conclusory assertion that its assessments are the "end result" of years of intelligence-gathering, and that a "skilled and knowledgeable individual" could glean from them "information regarding how this intelligence is obtained." Harris Decl. ¶ 26.[10] These broad-brush claims fail to demonstrate with the specificity required an actual link between disclosing the assessments and a "significant risk" of revealing or circumventing a DOD rule or practice, as FOIA requires. *E.g.*, *Crooker*, 670 F.2d at 1073-74.

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[9] AP does not challenge DOD's decision to withhold information identifying specific databases checked by CITF in its review of the Guantanamo detainees. *See* Smith Decl. ¶ 13.

[10] DOD asserts that the Court should simply accept these contentions, *see* DOD Mem. at 16, but to do so would be to give DOD the kind of "blind deference" that the Court of Appeals specifically has held is improper, *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999).

VI.
THE COURT SHOULD INSPECT UNREDACTED
VERSIONS OF THE SAMPLE DOCUMENTS *IN CAMERA*

FOIA specifically authorizes the Court to inspect agency records *in camera* to determine if they may properly be withheld, in whole or in part, under an exemption. *See* 5 U.S.C. § 552(a)(4)(B). *See Donovan*, 806 F.2d at 59 (court has broad discretion to require *in camera* review). Courts have authorized *in camera* inspection to determine whether information has been properly withheld under a wide range of exemptions, including those asserted by DOD in this case. *See, e.g.*, *Donovan*, 806 F.2d at 59 (Exemption 1); *Crooker*, 670 F.2d at 1054-55 (Exemption 2); *Tigue*, 312 F.3d at 82 (Exemption 5); *Perlman v. U.S. DOJ*, 312 F.3d 100, 104-05 (2d Cir. 2002) (Exemptions 6 and 7(C)), *vacated on other grounds*, 541 U.S. 970 (2004). Because *in camera* review can strain a trial court's resources, it is most appropriate when there are only a small number of documents to be examined, as is the case on this motion. *See id.*; *see also Local 32B-32J Serv. Employees Int'l Union, AFL-CIO v. Gen. Servs. Admin.*, No. 97 Civ. 8509 (LMM), 1998 WL 726000, at *11 (S.D.N.Y. Oct. 15, 1998).

In deciding whether to inspect documents *in camera*, courts take a number of factors into consideration, including: "(a) judicial economy, (b) the conclusory nature of the agency affidavits, (c) bad faith on the part of the agency, (d) disputes concerning the contents of the documents, (e) whether the agency requests an *in camera* inspection, and (f) the strong public interest in disclosure." *Donovan*, 806 F.2d at 59. *In camera* review is permissible "where the record showed the reasons for withholding were vague or where the claims to withhold were too sweeping or suggestive of bad faith, or where it might be possible that the agency had exempted whole documents simply because there was some exempt material in them." *Halpern*, 181 F.3d at 292.

The AP makes no suggestion of bad faith by DOD, but virtually every other relevant factor cries out for *in camera* review – particularly given the intense public interest in the disclosure of the information in dispute. The claims of exemption by DOD are as all-encompassing as they are conclusory. The wholesale redactions of virtually all substantive information reflected in the sample documents further raises the possibility that DOD has withheld entire sections simply because they contain some exempt material, even though DOD is obligated to segregate discloseable material from information that may properly be withheld. *See Donovan*, 806 F.2d at 58; *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 950-51 (D.C. Cir. 1979); 5 U.S.C. § 552(b).

For all these reasons, the Court should review the sample documents in unredacted form *in camera* to determine whether information has properly been withheld and to compel the production of those segregable materials that are not properly kept secret. Any fact presented in the documents should be disclosed unless DOD has met its burden of establishing that disclosure is likely to damage national security or to reveal confidential agency procedures. Particularly given that the sample documents are not voluminous – a total of just 12 pages – a review of the unredacted documents should occur before the Court rules on DOD's motion for partial summary judgment. *See, e.g.*, *Donovan*, 806 F.2d at 60; *Diamond v. FBI*, 707 F.2d 75, (2d Cir. 1983) (noting District Court's in camera review of documents purportedly protected by Exemption 1); *ACLU v. DOD*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005) (conducting *in camera* review to ensure that DOD properly segregated non-exempt material from information covered by Exemption 1).

CONCLUSION

For each and all of the foregoing reasons, the Court should review the sample documents *in camera* and on the basis of that review deny defendant's motion for partial summary judgment to the extent that detainee identifying information, pure facts and DOD's findings can be disclosed without jeopardizing national security or exposing DOD's confidential law enforcement procedures and techniques.

Dated: September 12, 2006

Respectfully submitted,

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